(1)

Supreme Court, U.S
FILED

No. 05-3202 051620 MAR 8 - 2006

OFFICE OF THE CLERK

In The
Supreme Court of the United States

Paulette P. Wright

Petitioner,

v.

Department Of Veterans Affairs

Respondent

On Petition for a Writ of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

Petition for Writ of Certiorari

Sylvia Scott, Esq.
Kenneth Mizrach
Department of Veterans Affairs
385 Tremont Avenue
East Orange, NJ 07108-1095
(973)-676-1000

Paulette P. Wright, Pro Se
515 Mt. Prospect Ave. 2L
Newark, NJ 07104
(973)484-9933

May 11, 2006

QUESTIONS PRESENTED

I. Did the agency removed the petitioner for misconduct or was she removed because of a grievance complaint filed with the EEO for which she was not charged?

II. Was the agency in compliance with the fundamental requirement of the due process and collective bargaining agreement?

III. Would or has the agency applied the same Adverse action to other employees with similar or more serious misconducts alleged?

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceeding below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTION
AND STATUTORY PROVISION INVOLVED 1-3

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 4

I. The Federal Circuit erred to decide whether the agency taking such Adverse Action in this case has violated federal laws, statues, rules, procedures or regulations.....7-9

II. The Federal Circuit has not decided the important issues relevant to this case requiring, the intervention of this court to exercise its supervisory power 8

CONCLUSION 9

INDEX TO APPENDIX ..... App. i

APPENDIX..... App. 1

Table of Authorities

Cases Page

Procunier v. Martinez U.S. 396 (1974).....2

Gerlach v. Federal Trade Commission DC07528011020 (1981).....5

Stearn v. Dept. of Navy 280 f. 3d 1376, 1380. Fed Cir (2002).....7,8

Douglas v. Veterans Administration 5 M.S.P.R 280, 306 (1981).....7

Jones v. Dept. of Navy 67 M.S.P.R. 67. 6, 8, (1995).....8

Vashi v. Potter, Fed Cir. (2004).....8

Bond v. Dept. of Energy 82 M.S.P.R. 534, 25, (1999).....9

Russo v. United States Postal Service
284 f. 3d 1304, 1310, Fed Cir. 2002).....8

Shively v. Dept of Army M.S.P.R. 531, 532(1993).....1

Constitutional, Provisional, Statues and Regulation

28 U.S.C.

1254.....1

Title I 1

Title VII.....1

5 U.S.C.

2301.....2,5,8

7703.....6,7,8

1221.....3

7114.....4

7703.....6,7,8

7503 2

2302.....3

7101-7135 1

Petition For Writ Of Certiorari

Paulette P. Wright (Petitioner, PRO Se), respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit

Opinion Below

The December 8, 2005 judgment of affirmance without opinion entered under Federal Circuit Rule 36. Entry of judgment by the U.S. Court of Appeals for the Federal Fed. Cir, N0. 05-3202

Jurisdiction

This court has jurisdiction over the Petition for Certiorari pursuant to 28 U.S.C. 1254 (1). This is a petition for writ of certiorari to review a decision of the U.S. Court of Appeals for the Federal Circuit dated December 8, 2005. Petitioner filed a timely petition for review of The Merit System Protection Board final judgment which was by the U.S. Court of Appeals for the Federal Circuit

Constitution and Statutory Provision Involved

This matter arises under 5 U. S.C. 2302 (b) (9) which makes it a prohibited personnel practice to retaliate against an employee or applicant "because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation. See *Shively v. Department of the Army*, 59 M.S.P.R. 531, 537 (1993) and the Federal Service Labor- Management Relation Statue (Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. & 7101-7135) which allows federal employees to understand their rights to organize, grieve, complain, bargain collectively, and participates through labor organization and in decisions which affects them,

with full regards for the public interest. The Civil Service Act of 1978 also outlines the rights and obligation of federal agencies, labor organization and employees. Petitioner was charged numerous times for making inappropriate statements, which is also a violation her Amendment 1 rights. Thurman Marshall wrote that, the "first Amendment serves not only the needs of the polity but also those of the human spirit-a spirit that demand self expression." *Procunier v. Martinez*, U.S.396, (1974)

In order to ensure that all employees receive fairness equality and justice for all the Merit system principles under 5 U.S.C. 2301, Cause and Procedure: specifies that employee may be suspended for fourteen days or less for such cause which will promote the efficiency of the service ,including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct, see 5 U.S.C. 7503. Also Article 17, Disciplinary and Adverse Action Sec. 1 (A) p45. Labor-Management Agreement between the Department of Veterans Affairs and the Council of Veterans Administration, Local, National, Federation of Federal Employees, which clearly noted "Management agrees that action taken against unit employees will be taken for <u>just cause</u>, consistent with applicable law be fair and equitable". "The party's agrees that the concept of progressive and discipline is designed primarily to correct and improve employee behavior, rather than to punish, will usually be followed". "A more serious penalty than the least available may be taken whenever required by law or regulation, or required to correct the attitude or conduct of the employee." Usually progressively more serious penalties will be administered before removal is initiated, unless the offense is so serious that removal is justified. Employees will not be subject to arbitrary or unreasonable acts by supervising personnel".

Merit System Principles, <u>2301</u>, Subsection (b) (2): All employees and applicants for employment should receive fair and equitable treatment in all aspect of personnel management with proper regards to their privacy and constitutional rights. (4):All

employees should maintain high standard of integrity, conduct, and concern for the public interest. (6): Employees shouldbe retained on the basis of the adequacy of their performance. Inadequate performance should be corrected and employees should be separated who cannot or will not improve their performance. (A) (B) : Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences a violation of any laws, rules or regulations.

Individuals rights of action in certain reprisal cases, 5 U.S.C. 1221(e) (1): In any case involving an alleged prohibited personal practice as described under section 2302(b) (9), the Board shall order such corrective action as the Board considers appropriate, if the employee, former employee or applicant for employment has demonstrated that a disclosure described under section 2302 (b) (9) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action, through circumstantial evidence, such as evidence that- (A):the official taking the personnel action knew of the disclosure and (B): the personnel action occurred within a period of time , such that a reasonable person would conclude that the disclosure was a contributing factor. The Board noted that the misconducts alleged were the contributing factor to the removal and not the "Protected Activity", yet the agency has not demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure (2). The facts that their were no investigation into any of the charges, a suspension without prior notice after petitioner sought advice of union representative, the agency refusal to investigate the charges as requested in writing by the petitioner, no attempt to utilize progressive discipline, or Alternate Dispute Resolution (ADR) and the fact that petitioner had never had so many paper trail of misconducts during her almost ten years tenure until after the EEO complaint certainly indicated a prohibited personnel practice under 2302 (b) (9). The head of the agency also refused to respond to petitioner's letter prior to the removal, requested the harassments

by supervisors be stopped, s[illegible] they were attributing to emotional stress on the job. Supervising personnel and head of the agency knew of the disclosure to EEO. Petitioner became emotionally stressed by the persistent and constant accusations and contacted the "Employee Assistance Program" numerous times seeking assistance. Under the collective bargaining agreement between the Department of Veterans Affairs and NFEE, investigations into all charges, progressive discipline and ADR were all part of the agreement which the agency violated. 5 U.S.C. 7114: Representation rights and duties (a) (1), A labor organization which has been accorded exclusive recognition is the exclusive representative of the employee in the unit it represents, and is entitled to act for, and negotiate collective bargaining agreement covering ,all employees in the unit. An exclusive representative is responsible for representing the interest of all employees in the unit it represents without discrimination and without regards to labor organization membership. (5) (b): The duty of an agency and an exclusive representative to negotiate in good faith, under subsection (a) of this section shall include the obligation- (1)to approach the negotiation with a sincere resolve to reach a collective bargaining agreement;(2) to be represented at the negotiations by duly authorized representative, prepare to discuss and negotiate on any condition of employment; (3) to meet at reasonable time and convenient places as frequently as may be necessary and to avoid unnecessary delays.

The agency did not indicate what rules, laws , procedure, policy or regulation has been violated by the petitioner. Their was a genuine nexus between the retaliation and the adverse action considering the circumstances of this case and the periods in which the alleged charges were drawn by supervising personnel. AJ denied petitioner most important witnesses, a union representative and a medical doctor who petitioner requested to testify on her behalf. Aj was made aware by prior counsel (Eldrige Hawkins Esq.) why the witnesses that petitioner requested, were relevant, but he presumed the above witnesses were irrelevant to the case. Aj only approved those witnesses who he perhaps knew would testify for the agency and not the petitioner. All the witnesses who testified against petitioner

were dietitians, a locksmith and a human resource personnel. The administrative judge during the hearing constantly objected to petitioner's counsel when he asked, about policy, procedures and agency violations of federal laws and collective bargaining agreement. The reason for the suspension is still in questions.

The administrative judge rejected Petitioner's defense of harmful procedural error and retaliation even with the abundance and convincing amount of written evidence provided prior to and during the hearing. See *Gerlach v. Federal Trade Commission*, DC0752801020 (1981), upholding presiding "Board" official's determination that penalty of removal was retaliatory response to employee's filing a grievance, based on the extreme disparity, between the minor nature of the sustained charges and the penalty of removal. During the administrative hearing, AJ had severely restricted petitioner's counsel, Eldrige Hawkins from questioning regarding rules and violations which were evidential of individual's intent or men rea and disparate treatment against petitioner, because of her complaint. During the administrative hearing, AJ told petitioner's attorney that if he asked the witnesses the wrong questions the judge would disqualify, him from being petitioner's attorney. AJ also denied Mr. Hawkins application to recluse himself as judge because of the impropriety of his rulings and prejudicial cross examination by the judge that disfavored petitioner, 5 U.S.C. 2301 8 (A). The judge also stated that petitioner could find another job somewhere else other than the DVA. He also indicated petitioner should know the rule of answering her beeper. There were no rules, policy, or procedure regarding any of the alleged misconduct of which petitioner was charged. AJ was made aware that during the time the dietitians stated they beeped me, new beepers were being issued and it is still unclear what number the dietitians were calling.

Statement of the case

Paulette P. Wright (Petitioner) had prior counsel (John Boppert) petitioned for review of the "final decision" Of the Merit

Systems Protection Board. The Board sustained the removal from employment with the Department of Of Veterans Affairs who conducts business in the state of New Jersey. In the final petition the Board has denied the petition for review of the "initial decision" of the administrative Judge (AJ). The judge upheld seven of eight charges as well as the penalty of removal. The charges are controversial and have not been supported by substantial evidence, see 5 U.S.C, 7703 (c)2000.

At the time of removal petitioner was employed for almost ten years as a clinical dietitian, GS-11. Despite her hard work, exemplify work performance reviews, perfect attendance and strong commitment to patient care and public concern, she was removed from federal service on March 19, 2004 based on a three day suspension in june 2002 and an alleged reprimand in March 2003. Petitioner was charged based on the following misconducts. MSPB " Initial decision" (1) Failure to answer beeper and phone on July 11, 2003 (2) On August 28, 2003 failed to respond several times when she was paged regarding move plan (3) October 8, 2003 failed to meet with supervisor (4) On October 15, 2003 complained loudly on ward 5D that this floor is really very disorganized. Charge (5)(6) (7) (8) concern incidents which occurred at various times on October 24, 2003. (5)Making inappropriate statement to sheeba Jacobs (Dietetic intern) (6)Petitioner shouted "Oh my god dirty politics" when she saw Henry and went into her office and closed the door (7)Locked the door of her office (petitioner's office suit) (8) Refused to meet with supervisor. Charge (5) was dismissed by AJ.

The sequence of events which contributed to the removal started in June 2002when petitioner filed a complaint with the EEO located at Lyons NJ. The complaint was dismissed by the EEO. The EEO indicated that a grievance complaint was filed before the EEO complaint. Petitioner misinterpreted the law of the grievance procedure. Although in a written statement to the agency that a grievance complaint was filed, there was no complaint filed except the complaint filed with EEO. Petitioner was addressing only the grievance complaint filed with EEO. The agency and union

representatives who are employed at the Department of Veterans Affairs knew their was no other complaint filed and provided no guidance as how to further proceed. The EEO dismissal was appealed to the EEOC in Washington DC, but the decision of the EEO was affirmed and the suspension grieved was upheld based on the above reason mentioned above.

Standard of Review: The U.S. Court of Appeals standard of review for The Merit System Protection Board is governed by statutes which set aside MSPB action finding or conclusion to ensure that it is not (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c) (2000); *Stearn v. Dep't of the Navy*, 280 F.3d 1376, 1380 Fed. Cir. (2002). Under this standard the U.S. Court of Appeals for the Federal Circuit may reverse the decision of the MSPB if it is not supported by such relevant evidence as a reasonably mind might accept as adequate to support a conclusion. In many circumstances cited above there were abuse of discretion by Aj as well as other criteria set forth in the Standard of review.

REASON FOR GRANTING THE WRIT

I. The Federal Circuit erred to decide whether the agency taking such Adverse Action in this case has violated federal laws, statues, rules, procedures or regulations

1. The court erred in finding that the agency's selection of the penalty of removal far exceeded the bounds of resonableness. The Board reviews an agency penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. In this case the Board did not mitigate the alleged charges, *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). The Board's role is not to decide what penalty it would impose, but, rather, whether the penalty selected by the agency exceeds the maximum reasonable

penalty. See *Jones v. Department of the Navy,* 67 M.S.P.R. 6, 8 (1995). The Board mitigates a penalty only where the penalty imposed by the agency is unreasonable. The agency penalty of removal in the case Paulette P. Wright v. Department of Veterans Affairs was unreasonable and far exceeded the maximum reasonably penalty, considering the minor nature of the alleged charges. The charges could have been mitigated by Aj, but wasn't which shows prejudice towards petitioner.

2. The charges were not supported by substantial evidence 5 U.S.C. § 7703(c) (2000); *Stearn v. Dep't of the Navy*, 280 F.3d 1376, 1380 (Fed. Cir. 2002) and also *Russo v. United States Postal Serv.*, 284 F.3d 1304, 1310 (Fed. Cir. 2002). AJ favored the agency and was prejudiced during the administrative hearing towards the petitioner. 5 U.S.C. 2301:8 (A) : Employees should be protected against arbitrary action, personal favoritism or coercion for partisan, political purposes.

3. The lower court has not sanction the agency for the many violations of federal laws, rules, status or regulations. Petitioner is seeking equal justice, fairness and protection under the laws and statues which the lower court erred in providing, requiring this court supervisory power. Petitioner still has not received remedy or relief sought from the lower court. The treatment toward petitioner is unfair and unjustified.

II. The Federal Circuit has not decided the important issues relevant to this case requiring, the intervention of this court to exercise its supervisory power

4. The agency failed to show that the penalty of removal was within the bounds of reasonableness for the sustained charges, failed to demonsrate it has in effect a zero tolerance policy pertaining to the charges, *Vashi v. Potter,* Fed. Cir. (2004)

5. The agency did not consider the relevant Douglas factors and the relevant aggravating factors, i.e., the seriousness of

the petitioner's misconduct, in relation to her duties. Relevant mitigating factor was not considered, i.e., the appellant's length of service, and her work history. Finally, the notoriety of the charges in selecting the penalty was omitted, *Bond v. Department of Energy*, 82 M.S.P.R. 534, 25 (1999).

Conclusion

For the foregoing reasons above, this court should grant the certiorari in this case to resolve the important issues of federal laws, rules, policy or regulations pertaining to this case as the lower court did not address any of the issues. This court should also decide that all appeals to the Merit System Protection Board, (Initial and Final Review), U.S. Court of Appeals for the Federal Circuit and this court was timely filed. The court should also compared the punishment of others employees with that of the petitioner based on federal laws,rules, policy and procedures

Respectfully Submitted

Sylvia Scott, Esq.
Kenneth Mizarach
Department Of Veterans Affairs
385 Tremont Avenue
East Orange, NJ 07108-1095
973)676-1000

Paulette P. Wright
515 MT. Prospect Avenue, 2L
Newark, NJ 07104
(973)484-9933

Index to Appendix Material

Opinions and Orders

1. U.S. Court of Appeals for the Federal Circuit, Mandate March 2, 2006.....App. 1

2. Federal Circuit affirmed MSBP final order without opinion, December 8, 2005).....App. 2

3. Final Order of MSBP Denying "Initial Petition" for review April 27, 2005).....App.3

United States Court of Appeals for the Federal Circuit

05-3202

PAULETTE P. WRIGHT,

Petitioner

v.

DEPARTMENT OF VETERAN AFFAIRS

Respondent,

JUDGMENT

ON APPEAL from the Merit Systems Protection Board
IN CASE NO(S): NY0752040201-I-1
ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT
DEC 8, 2005 Jan HORBALY, Clerk

ISSUED AS A MANDATE: MARCH 2, 2006

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

MAR 2, 2006

JAN HORBALY CLERK

Note: Pursuant to Fed Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

05-3202

PAULETTE P. WRIGHT

Petitioner,

v.

DEPARTMENT OF VETERAN AFFAIRS

Respondent.

Decided: December 8, 2005

Before MAYER, RADER, and DYK, Circuit Judges.

RADER, Circuit Judge.

The Merit Systems Protection Board (Board) sustained the Department of Veterans Affairs (DVA) removal of Paulette Wright, a former Clinical Dietitian. Wright v. Dep't of Veterans Affairs, No. NY-0752-04-0201-I-1 (M.S.P.B. Apr 27, 2005) (Final Decision). This court affirms.

DISSCUSSION

I

The DVA removed Ms. Wright from her position on eight charges, including failure to respond to pager and the phone and failure to follow a supervisor's instruction. Ms. Wright was also accused of blatantly inappropriate and disrespectful conduct.

Following a hearing, the administrative judge rejected Ms. Wright's defenses of harmful procedure error and retaliation. The judge then sustained all but one of the charges. Wright v. Dep't of Veterans Affairs, No. NY -0752-04-0201-I-1 (M.S.P.B. July 26, 2004) (Initial Decision). The Board denied Ms. Wright petition for review for failure to meet the criteria for review set forth at 5 C.F.R. & 1201.115(d). Final Decision. This court has jurisdiction under 28 U.S.C. & 1295 (a)(9).

II

This court affirms the Board decision unless it is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law or unsupported by substantial evidence. Kewley v. Dep't of Health & Human Servs., 153 F.3d 1357, 1361 (Fed Cir. 1998).

Ms. Wright asserts the administrative judge wrongfully excluded the testimony of certain "important" witnesses. The administrative judge did approve four of the appellant witnesses, but held that Ms. Wright did not show that the additional proposed witnesses were relevant. In any case, "{a} determination to allow or exclude witness testimony is within the sound discretion of the administrative judge." Guise v Dep't of Justice, 330 F.3d 1376, 1379 (Fed Cir. 2003). Ms. Wright has not presented any new evidence here to show the relevance of the disputed witnesses. The record does not show that the administrative judge abused his discretion.

Ms. Wright also contends that substantial evidence does not support the Board's decision. The administrative judge credited the uncontradicted testimony of a number of witnesses with respect to critical events. An administrative judge credibility determinations are virtually unreviewable See Frey v. U.S. Dep't of Labor, 359 F 3d 355, 13561 (Fed. Cir. 2004). Thus, this court has no reason to

disturb the credibility determinations.

Further the Board did not err in rejecting Ms. Wright's affirmative defense of retaliation. The administrative judge found that, on balance, Ms. Wright's misconduct, not her protected EEO activity was the motivation for the agency's action. Therefore, there was no genuine nexus between the alleged retaliation and the adverse action. See Warren v. Dep't of Army, 804 F.2d 654, 656 (Fed. Cir.1986). On the record we shall not disturb the finding.

Finally the Board did not err in rejecting Ms. Wright's affirmative defense based on the applicable collective bargaining agreement. Ms. Wright argued that the agreement required further inquiry into certain charges and more levels of progressive discipline before her removal. The administrative judge found no evidence that the agreement provisions were violated, and none that any violation would have a harmful effect. The court perceives no reversible error.

For the forgoing reasons the final decision of the Board is affirmed

United States Court Of Appeals for The Federal Circuit

Notice of Entry of
Judgment Accompanied by opinion

Opinion filed and judgment Entered:12/08/05

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above . The mandate will be issued in due course.

Information is also provided about petition for rehearing en banc. The questions and answers are those frequently asked and answered by the clerk's office. Costs are taxed against the petitioner (s) under rule 39. The party entitled to cost is provided a bill of costs form and an instruction sheet with this notice. The parties are encouraged to stipulate the cost. A bill of cost will be presumed correct in the

absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties , payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, the party pro se. Payment of cost should not be sent to this court . Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34 (g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.

JAN HORBALY
Clerk

cc: Paulette P. Wright
Thomas Fatouros

Wright v. VA, 05-3202
MSBP-NY075204021-I-1

Notice to Pro Se Appellants And Petitioners

The court has acted on your appeal or petition for review. The relief you sought from the court was denied. The accompanied judgment disposed of your appeal. It is a judgment of affirmance without opinion entered under Federal Circuit Rule 36, which states:

Rule 36. Entry of judgment.

Judgment of affirmance without opinion , citing this rule , when it determines that any of the following circumstances exits:

(a) the judgment decision or order of the trial court appealed from is based on findings that are not clearly erroneous;

(b) the evidence is support of a jury verdict is sufficient;

(c) summary judgment, directed verdict or judgment on the pleadings is supported by the record;

(d) the decision of the administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or

(e) a judgment or decision has been entered without an error of law; and an opinion would have no precedential value.

Consequently, no opinion of the court was filed in this appeal by the panel of judges that decided the appeal. Inquiries to the court seeking further explanation of the court's decision cannot be honored as the deliberations of the panels of the court in particular appeals are not recorded.

This is a final judgment of the court. No further judical review is available as a matter of right. The Supreme Court of the United States may review the judgments of this court by granting a petition

for writ of certiorari; however, a review of writ of certiorari is not a matter of right, but of judicial discretion, granted only when there are special and important reasons therefor.

United States Of America

Merit System Protection Board

Paulette P. Wright
Appellant

Docket Number
NY-0752-04-0201-I-1

v.

Department Of Veterans Affairs

Date: April 27, 2005

Agency

John A. Boppert, Esquire, Newark, New Jersey, for the appellant.

Sylvia Scott, Esquire, East Orange, New Jersey, for the agency.

Before

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

Final Order

The appellant has filed a petition for review of in this case asking to us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulations that establishes this standard of review is found in title 5 of the code of Federal Regulations, section 1201.115d
(5 C.F.R.) & 1201.115).

After fully considering the fillings in this appeal, we conclude

that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulations that affects the outcome. 5 C.F.R. & 1201.115 (d).

Therefore, we Deny the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. & 1201.113

For The Board:
Washington, D.C.

Bentley M. Roberts, Jr.
Clerk of the Board

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

Paulette P. Wright

Petitioner,

v.

Department Of Veterans Affairs

Respondent

On Petition for a Writ of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

Supplemental Appendix 4
Petition for Writ of Certiorari

Sylvia Scott, Esq.
Kenneth Mizrach
Department of Veterans Affairs
385 Tremont Avenue
East Orange, NJ 07108-1095
(973)-676-1000

Paulette P. Wright, Pro Se
515 Mt. Prospect Ave. 2L
Newark, NJ 07104
(973)484-9933

June 15, 2006

Supplemental Appendix 4

United States Of America
Merit System Protection Board
New York Field Office

Paulette P. Wright
Appellant,

Docket Number
NY-0752-04-0201-I-1

v.

Department of Veterans Affairs,
Agency.

Date: July 26, 2004

Eldridge Hawkins, Esquire, East Orange, New Jersey, for the appellant. Sylvia Scott Esquire, East Orange, New Jersey for the agency.

Before

Joseph A. Hallock
Administrative Judge

Initial Decision

Introduction

The appellant filed a timely appeal of the agency's decision to remove her from the position of Dietitian, GS-11, effective March 19, 2004. The hearing she requested was held on June and 9, 2004. The Board has jurisdiction over this appeal. *See* 5 U.S.C. §7511 (a), 7512 and 7513. After the conclusion of the hearing, I issued a bench decision in which I **AFFIRMED** the agency's action. An edited text of the decision follows.

PROCEEDINGS

This is an appeal of the agency's decision to remove the appellant from her position of Dietitian at the VA Medical Center (hospital) in East Orange, New Jersey, effective March 19, 2004. The agency based its decision to remove the appellant based on eight charges which are set forth in detail in its notice of proposed removal dated January 7, 2004. See appeal file (AF), Tab 7, Subtab 4f. The appellant asserted two affirmative defenses: harmful procedural error and retaliation for protected activity.

Burden Of Proof

The agency bears the burden of proving each elements its charges by a preponderance of the evidence. [1] *Burroughs v. Department of the Army*, 918 f. 2d 170, 172 (Fed. Cir 1990). The agency must also prove: (1) The existence of a nexus between the sustained charge (s) and the efficiency of the service, 5 U.S.C. § 7513(a), and (2) reasonableness of its penalty. See *Douglas v. Department of Veterans Administrations*, 5 M.S.P.R. 280, 302 (1981). The appellant bears the burden of proving her affirmative defenses by a preponderance of the evidence. See 5 C.F.R. § 1201.56(a)(2)(iii)

The agency proved its charges with the exception of charge four.

In charge 1, the agency charged that on July 11, 2003, the appellant failed to respond when she was phoned and paged numerous times by Dr. Segal, Teresita Delotero RN, Pravina Patel, Registered Dietitian and Luci Williams Acting Clinical Nutrition

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1 Preponderance of the evidence is that degree of relevant that a reasonable person considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than not. See 5 C.F.R. § 1201.56 (c) (2).

Manager, regarding a patient on unit 5C who needed to be seen. Williams was acting on July 112003, in place of Dipakbala (Dipa) Patel who was absent on this date and would ordinarily have been serving as the appellant's immediate supervisor. Delotero, Pravina Patel and Williams testified on behalf of the agency.

Deltotero testified that she was working on July 11, 2003 and that she was making her round. She got to 5C unit at around 11:30 a.m. She testified that as soon as she got to the unit, people were screaming that a dietitian was needed. She testified that she paged the appellant a few times and got no response to the page. Pravina Patel testified that she was working on unit 4D on July 11, 2003 and she got a call from a doctor from unit 5C between 1:00 p.m. and 1:30 p.m. She testified that she did a number of things in response to the doctor's call, but the upshot is that among the things that she did is that the paged the appellant twice and got no response. These matters were reported to Williams, and there is documentation in the agency file which corroborates this. There is a statement from Deltotero at subtab 4i which is consistent with her testimony. There is a statement at subtab 4r from Pravina Patel which is consistent with her testimony. And there is a statement from Williams at subtab 4q which collaborates Delotero's testimony that she had paged the appellant and had not gotten a response.

The appellant's representative, in his cross- examination of one or more of the agency's witnesses, asked questions the implications of which were that there may have been reasons why the appellant did not response to the pages that Delotero and Pravina Patel made to her, one being that apparently there was a changeover in the pagers

that took place around this time, and another being that perhaps the appellant was at a location where the pager was not working. But with respect to the latter, Williams gave uncontradicted testimony that if a pager was turned on, it would work at all times and in all location in the hospital. And insofar as the changeover of the pagers perhaps having been a contributing factor to the appellant's failure to respond, the appellant was present at the hearing, she was approved as a witness, and yet she did not testify to this effect on her own behalf. So there was really no evidence offered to support a finding in this regard. Furthermore I note that the appellant did furnish a statement dated November 25, 2003which is at subtab 4g in the agency file. This was in response to a notice date November 21, 2003. And, no where in this statement did the appellant say anything about problems with her pager or a change in the pager number. She simply flatly denied that she had engaged in any misconduct.

I also note that in her written response to the agency's proposed removal notice, the appellant made no such allegations. See AF, Tab 7, Subtab 4e. Again she essentially denied the alleged misconduct and claimed that the agency's proposed action was motivated by animus against her. She stated that the charges against her was incredible and had no merit. And she alleged that her proposed removal was a continuation of constant harassment and humiliation against her by her supervisors, but she gave no details concerning the alleged humiliation and harassment. Finally I note that the March 1, 2004 recommendation for removal of Christine C. Machiedo, M.D., who was designated by Kenneth Mizrach, the agency's deciding official, to receive the appellant's oral reply,

contains a summary of the appellant's oral reply which shows, with regard to this charge, that the appellant simply denied that the charge was true and said she always answered her pager in a timely manner. *Id.*, Subtab 4c. This, in itself, is contradicted by the summary of the appellant's oral reply with respect to charge 2, which I will come to in a moment, which also charged the appellant with failing to respond to pages in a timely manner, in reply to which the appellant stated she did not call back right away because she was busy that day.

The appellant representative also asked questions on cross-examination of the agency's witnesses, the imports of which was the appellant may not have known what was required of her insofar as timely responding to pages. But over the appellant's objection, I admitted into evidence as agency's Exhibit 1 a verification of verbal counseling dated October 4, 2000 which I find shows clearly that the appellant knew precisely what was required of her and was aware that a page was a priority matter that had to be responded to immediately. *See* AF, Tab 12. The appellant has argued that this counseling should not have been admitted into evidence, because of some requirements that it had to be destroyed in six months. This was alluded to in testimony, but there was no documentary evidence in the record concerning such a requirement.. Furthermore, I find that, while this counseling may have been time-barred as a basis for any subsequent disciplinary action that the agency may have taken, it was not relied on for such purpose. It was admitted solely for the purpose of showing knowledge on the part of the appellant of what was required of her in responding to pages. Considering all of

the relevant evidence on this charge, I find the charge proven by a preponderance of the evidence.

Charge 2 is on August 28, 2003, the appellant failed to respond in a timely manner when she was paged several times regarding her move plan, beginning ay 10:50 a.m.[2] by Vivian Henry, Supervisory Dietitian, the agency's proposing official, who was Dipa supervisor and the appellant second line supervisor. Henry gave uncontradicted testimony that she tried to page the appellant starting at 10:50 a.m. until 11:00a.m., that she paged her twice, that she waited for the appellant to respond to the page, that she did not get any response, and that she then phoned her and left a message. Further Henry testified that at 11:40 a.m. she had a voice mail message from the appellant. She testified that at 11:50 she left another page, and she then had to leave her office. And, when she returned at 1:00, she had another voice mail message from the appellant.

I find this evidence shows that the appellant failed to respond to the pages, but there was a delay in responding. The charge here is that the appellant failed to respond in a timely manner. So the issue presented is what constitutes a timely manner, and I find that timely with respect to a page meant that it was a priority. When I considered the testimony of Dipa Patel, Delotero, Williams and Henry, as well as the October 4, 2000 verification of verbal counseling, I find that there was a common understanding among employees at the hospital that a page was a priority matter and an employee who received a page was expected to stop what he or she was doing, find the nearest

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2 The agency proposal's notice shows the time as "10:50 P.M." but it is clear from the entire charge, and Henry's testimony, that this is a typographical error.

phone, and respond to the page . I find that the preponderant evidence shows that the appellant failed to do this. Indeed, she admitted as much in her oral response, the summary of which shows that she stated that she did not call Henry back right away because she was busy that day. I therefore, find that charge 2 proven by a preponderance of the evidence.

Charge 3 is that on October 8, 2003, Dipa Patel called the appellant and asked her to come to Patel's office, because Patel was conducting a disciplinary investigation of the allegations outlined in charges 1 and 2. Further the appellant refused to meet with her. She was also disrespectful, stating that Patel and Henry had nothing better to do, and they should get real jobs. The appellant then stated that they (Patel and Henry) could do whatever they wanted and she would not sign anything. Based on this conduct, the appellant was charged with failure to follow her supervisor's instruction, disrespectful conduct to Patel and making disparaging remarks concerning Patel and Henry. Patel come to her office. She testified, again this was uncontradicted testimony, that this event in question did, in fact, occur as detailed in the agency's proposal notice. And that she testified that she was offended by the appellant's response, upset by her behavior, and unable to do her job as a supervisor as a result. Here again the appellant was present at the hearing, she was approved as a witnesses, but she elected not to testify on her own behalf. I therefore, have the uncontradicted testimony of Patel in support of this charge, and I find the charge proven by a preponderance of the evidence.

Charge 4 is that on October 15, 2003, on unit 5D, the appellant complained loudly, stating "this floor is really very

disorganized" in front of both staff and patients present at the nursing station. The appellant was charged with making loud disparaging remarks regarding the operation of a patient care unit. The agency charged that her conduct was especially inappropriate, as her remarks were in a public area and in the present of patients. Delores Fernandez testified on behalf of the agency with respect to this charge. It was based on a report by Fernandez that this charge was brought. Although Fernandez testified on direct examination that she reported the incident to Henry and asked her to speak to the appellant, because she found the appellant's behavior to be unprofessional, on cross-examination she testified that, although in her view the appellant spoke in a loud voice, she did not speak "very loud". Rather according to the witness, the appellant did not speak in the right tone. She further testified that she took no exception to the substance of the appellant's remark, but just to their timing and tone. She conceded that there were other persons present besides herself, none of which complaint about the appellant's behavior. Furthermore, contrary to the agency's proposal notice which charged that the appellant's remark were made in the present of patients. Fernandez's testimony was that patients may have been present. When I considered the entirety of Fernandez's testimony, I concluded that while Fernandez may have been offended by the appellant's remark, her reaction does not appear to have been shared by others who were present. I would expect that if, as charged, the appellant made loud, disparaging remarks, others would have heard the remarks and would have joined in Fernandez's criticism of the appellant. Yet it was only Fernandez who made any complaint about the appellant's behavior. I therefore do not find this charge was

proven by a preponderance of the evidence.

Charge 5 through 8 concern incidents that occurred at various times on October 24, 2003. And there was testimony from Ms. Sheeba Jacob and from Henry, uncontradicted testimony, on these charges. In charge 5, the agency charged the appellant with making inappropriate statements to Jacob, specifically that the appellant stated to Jacob that she was uncomfortably working with her. Jacob was a Dietetic Intern. The appellant was assigned to work with her. Jacob testified that, as charged, the appellant told her she was uncomfortably working with her, since her past made her not trust anyone. She also testified that the appellant told her Dipa Patel and Henry had motives to or grab information pertaining to her. I find that the statements made by the appellant, under the circumstances to a new employee who was assigned to her for training were inappropriate. And, to the extent that they evidence an unwillingness on the appellant's part to work with Jacob, this was inappropriate. I find that there was no reason for this. Jacob testified that the appellant's statement made her feel very bad. I found this reaction was understandable, notwithstanding the fact that the appellant - apparently informed Jacob that it was nothing personal. I find it hard to believe that anyone would have reacted any differently than Jacob on being told that the person they were assigned to work with did not want to work with them, whatever the reason. Accordingly I find this charge was proven.

Charge 6 is that when the appellant saw Henry in a file room which was adjacent to her office, she inappropriately shouted "Oh my God, dirty politics " and went into her office and locked the door. She stated that the door would close from that moment onward. She

asked Jacob to work in another office, and stated she was not interested in working with her, because of the frustration of the day. The charge is that the appellant made inappropriate statement to Jacob and was disrespectful and inappropriate toward Henry. Henry gave uncontradicted testimony in support of this charge. Now, much has been made of the fact that, while the appellant was charged with shouting when she saw Henry "Oh my God dirty politics", in Henry's written statement which is in the record at subtab 4n in the agencys file, Henry indicated that she only heard the appellant say "Oh my God. " Henry admitted in her testimony that she did not hear the appellant say "dirty politics." But Jacob who was present at the time gave, uncontradicted testimony that she heard the appellant say "Oh my God, dirty politics." So, I find from the preponderance of the evidence, that the appellant made the statement attributed to her, and this was inappropriate. I also find the way she reacted upon seeing Henry was inappropriate and disrespectful. That she went into her office locked the door, said she would not come out, and asked Jacob to work in another office, I find all of such behavior was unprovoked and inappropriate under the circumstances. Accordingly, I find this charge was proven.

Charge 7 is that later the same day the appellant locked the outer door to the office suite and, as a result, a locksmith Jeffrey Robinson, who testified for the agency had to come to open the door. Further, that the appellant then emerged from her office and upon observing Henry went back into her office and locked the door, that she did not respond when Henry knocked on the door and called her name, that Henry had to use her key to open the appellant's door.

and that the appellant refused to speak with her, stating she was busy and had nothing to say to her. The appellant was charged with deliberately locking the outer door to the office suite, thereby causing inconvenience and the need to have a locksmith come to open it, and blatantly inappropriate, disrespectful conduct toward Henry.

Robinson gave uncontradicted testimony that the appellant slammed her office door in Henry's face and that he was shocked by what occurred. Although this is not charged, he testified that he heard the appellant say to Henry "I don't appreciate you eavesdropping on my conversation". Apparently the appellant suspected from the presence of Henry in the file room which was next door to her office, that Henry was eavesdropping on her, but the uncontradicted testimony is that the room next door to the appellant's office was a file room which was used to store the files of Henry and Dipa Patel. And Henry gave uncontradicted testimony that she was in the office looking for files, which is something she did regularly on a daily basis, often several times a day. Considering the preponderance of the evidence, I find charge 7 proven.

Charge 8 is similar to charge 3 in that here, again, the charge is that Dipa Patel called the appellant asked her to come to her office to discuss the events that occurred earlier in the day on October 24, and that the appellant refused. Further, the phone then got disconnected and the appellant did not answer the phone when Patel immediately called back, and that she did not come to Patel's office even though a message was left instructing her to do so. The charge is failure to follow instruction and blatantly inappropriate and disrespectful conduct toward a supervisor and toward Henry as the

Service Chief. Both Patel and Henry gave uncontradicted testimony with respect to this charge, which shows preponderance of the evidence, that charge 8 was proven.

The appellant did not prove her defense of harmful procedural error.

To prove harmful procedural error, an appellant must prove the agency committed an error in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See* 5 C.F.R. & 1201.56 (c)(3). The burden is upon the appellant to show that the agency committed an error and that the error was harmful, i.e., that it caused substantial prejudice to her rights. Reversal of an agency action is warranted only where the procedural error is likely to have had a harmful effect upon the outcome of the case before the agency. *See* Bowden v. Department of the Army, 59 M.S.P.R. 662, 668-69 (1993).

The appellant argued that the agency committed harmful error in a number of respects based on the provision of the applicable collective bargaining agreement. *See* AF, Tab 17. But, I find that, while there have been allegations that such errors occurred, there has been no evidence offered in support of such allegations. Furthermore, when I consider the provisions of the collective bargaining agreement that are cited in the appellant's closing argument, I do not find from my review of the provisions that there is any evidence to show that such provisions were violated. Furthermore, even assuming that there was some violations of some parts of these provisions, I do not find that the appellant has shown that any such violations is likely to have had a harmful effect on the outcome of the case before the agency. Accordingly, I find that the appellant did

not meet her burden of proving that the agency committed any harmful error in reaching its decisions to remove her.

The appellant did not prove her defense of retaliation.

The appellant asserted an affirmative defense of retaliation for protected EEO activity. In order to establish reprisal, an appellant must show that: (1) She engaged in protected activity; (2) the accuse official (s) knew of the activity; (3) the adverse action under review could, under the circumstances, have been retaliation; and (4) a nexus between the retaliation and adverse action. *See Warren v. Department of the Army*, 804 f.2d 654, 656-58 (Fed. Cir. 1986). The final criterion require a more searching scrutiny to determine whether there is a genuine nexus and whether the action was taken in retaliation. *See Oliver v. Department of Health and Human Services*, 34 M.S.P.R. 465, 471 (1987), aff'd 847 f.2d 842 (Fed. Cir.1988) (Table). The appellant has the burden of establishing, by a preponderance of the evidence, that her protected conduct was a substantial or motivating factor in the adverse action taken against her. *See Gomez v. Department of Justice*, 36 M.S.P.R. 56, 61 (1988). I find the record shows the appellant did engaged in protected EEO activity, and that Henry knew of this activity. Therefore , the appellant's removal could, under the circumstances, have been retaliation. The dispositive issue, therefore, is whether there is a genuine nexus between the alleged retaliation and the adverse action. This requires a consideration of all the circumstances and the weighing of the gravity of the misconduct against the strength of the alleged improper motive to retaliate. *See Redschlag v. Department of the Army*, 89 M.S.P.R. 589. 623-24 (2001), *review dismissed*, 32 Fed. Appx. 543 (fed. Cir. 2002). Here, it appears that the alleged

improper motive to retaliate is based on a claim of disparate treatment, at least this was the implication of the questions asked by the appellant's representative on cross-examination of the agency's witnesses, but I do not find that there has been the requisite showing that employees were similarly situated to the appellant were treated more leniently. I find that the misconduct in question was very serious. Having sustained all, but one of the agency's charges, and given the appellant's prior disciplinary record discussed below, I find that the legitimate reasons that the agency had to act in this case outweigh the alleged illegitimate motive. On balance, I find that it was the appellant's misconduct that was the motivation for the agency's action and not her protected EEO activity.

Nexus and Penalty

I find that there is a nexus between the sustained charges and the effi[illegible]y of the service. This brings me to the matter of penalty. Here, o[illegible]he agency's charges has not been sustained. When the Board sust[illegible]ns fewer than all of the agency's charges, the Board may mitigate the agency's penalty to the maximum reasonably penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires a that a lesser penalty be imposed on fewer charges. *Lachance v. Devall*, 178 F. 3d 1246, 1260 (Fed. Cir. 1999).

In this case, the agency has not indicated that a lesser penalty be imposed based on the sustained charges. I find considering the various aggravating and mitigating factors, that the removal is well within the bounds of the maximum reasonable penalty under the circumstances of this case. Although the record shows that the appellant's performance was at least fully successful, and she had

almost eleven years of service, as I stated earlier, the record also shows that she had two prior disciplinary actions for misconduct similar to that at issue in this case. One prior action is a 3-day suspension effective June 24, 2002, for failure to carry out a work assignment and failure to carry out her supervisor's instruction. *See* AF, Tab 7 Subtab 4w; Tab 14. The other is a reprimand dated March 5, 2003.

The Board review of a prior disciplinary action is limited to determining whether that action is clearly erroneous, if the employee was informed of the action in writing, the action is a matter of record, and the employee was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline. *Bolling v. Department of the Air Force*, 9 M.S.P. R. 335, 339-40 (1981). I find that all the condition set forth in *Bolling* are met in this case, and while under *Bolling* the appellant was free to argue that the prior disciplinary action was were clearly erroneous, I heard no argument which would show that they were. I, therefore, find that under *Bolling* the agency was entitled to rely on the prior disciplinary actions, and that the penalty of removal is the maximum reasonable penalty under the particular circumstances of this case.

DECISION

The agency 's action is AFFIRMED

FOR THE BOARD:

Joseph A. Hallock
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. & 1201.112(a) (5).

NOTICE TO APPELLANT

This initial decision will become final on **August 30, 2004**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with he Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEO) or with a federal court. The paragraph that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important, because if you wish to file a petition, you must file in within the proper time period.

BOARD REVIEW

You may request Board review of the initial decision by filing a petition for review. Your petition for review must state your objection to the initial decision, supported by references of applicable laws, regulations, and the record. You must file your

petition with:

The Clerk of the Board
Merit System Protection Board
1615 M Street, NW.,
Washington, DC 20419